INDEX.

INDEX.

ABSENTEE.

In a redhibitory action the prescription of one year does not apply, except from the date of the discovery of the vice; and then not in the case of an absentee against whom no process could issue within that period. *Contra non valentem agere non currit prescriptis.*
Murphy v. *Guiterez*, 269.

ACTION.

Citation being the essential ground of all civil actions, in ordinary proceedings, the neglect of that formality annuls radically all proceedings had, unless the defendants have voluntarily appeared in the suit and answered the demand.
McCan & Harrell v. *Steamer Golden Age et als.*, 91.

Where a suit is commenced by a writ of sequestration, the judgment of the court below should have been *in rem* alone, reserving to the plaintiffs their right to an action *in personam.*
Peterson v. *Willard*, 93.

Actions relating to the ownership of the dotal or paraphernal property of the wife, or of some real right belonging to her, must be brought by the wife, duly authorized by her husband, or by the judge, if he fails to do it.
Pecquet v. *Pecquet's Executor et al.*, 204.

The act of 18th March, 1855, for a suit in damages, under Art. 2294, is a legal subrogation in favor of the persons there designated, to the right of action of the deceased sufferer, and the plaintiff must allege his cause of action as derived from the deceased.
Earhart v. *N. O. & C. R. R. Co.*, 243.

ACCOUNT.

Where, in complicated accounts between the syndic and the creditors, the court *a quo* appointed an umpire to decide, and an accountant to investigate the accounts, the judgment will be affirmed.
Diverges v. *His Creditors*, 112.

ADMINISTRATOR.

See Executor and Administrator.

ADVANCES.

Where a firm makes advances on consignments, they cannot be required to forward them to third persons subsequently, and thus be deprived of their privilege.
Bowker & Edmonds v. *Connolly & Co.*, 12.

AFFIDAVIT.

See PRACTICE.

AGENT AND AGENCY.

See PRINCIPAL AND AGENT.

APPEAL.

Damages will be allowed for a frivolous appeal, when prayed for by the appellee in his answer.
Beatty v. *Schwartz et als.*, 11.

Where the appellee does not claim damages *by his answer* for a frivolous appeal, none can be granted.
Cockburn v. *Groves & Co.*, 18.

A motion to dismiss an appeal for informality must be made within three judicial days after the record is filed in this court.
Eupheme, f. w. c., et als. v. *Maran et al.*, 21.

The verdict of a jury will not be disturbed except for good cause, and damages will be allowed on an appeal from a judgment thereon.
Field & Shackleford v. *Campbell*, 30.

The judgment of the court *a quo* will not be disturbed, unless good reasons are assigned therefor.
Hoffman v. *Dunham et al.*, 36.

An appellant who does not file within ten days after the record is brought up a written paper specifying an error of law appearing on the face of the record, unless he rely upon a statement of facts, an exception to the judge's opinion, or special verdict, will have his appeal rejected.
Kenion v. *Hawes*, 36.

The verdict of a jury, and consequent judgment thereupon, will not be disturbed, except for solid reasons.
Olivier v. *Randolph*, 50.

Where the counsel of the appellee does not file an answer to the appeal, he can be allowed no damages as for a frivolous appeal. His brief is not considered an answer.
Verges v. *Noel et al.*, 67.

The clerk of a court has a right to demand security for the cost of the transcript of appeal. He is not forced to rely upon the uncertain security of an appeal bond.
The State v. *Behrens, Clerk, &c.*, 67.

APPEAL, *(Continued.)*

Where a party is guilty of laches by not urging his claim in due time and place, he cannot complain in this court.
Tibben v. *Gratia & Co. et al.*, 72.

Where there is no prayer for a citation of the appellee, and he is not cited, it is a good ground for a dismissal of the appeal.
Schmidt v. *Benit*, 74.
The same v. *Jules Benit*, *Ibid.*

Where a judgment bears eight per cent. interest only five per cent. damages will be allowed for a frivolous appeal.
Lamothe v. *Lamarque*, 77.

Where the appellee moved to dismiss the appeal, that the case having been tried by a jury, no motion was made for a new trial—*Held:* That it is a good reason to affirm the judgment, but cannot be to dismiss the appeal.
Lafrance v. *Martin*, 77.

It is not necessary that more than one of the principals and the surety shall sign an appeal bond.
Ibid.

Where a statute has been repealed since the rendition of a judgment, inflicting a penalty, in the court *a quo*, this court cannot affirm it.
Mouras v. *Schooner Brewer et als.*, 82.

An error of calculation, patent on the face of the record, made in the court below, will be corrected on appeal without suggestion.
Moores & Co. v. *McConnell*, 84.

Where there is not in the transcript of appeal either a final judgment, signed by the judge, or such interlocutory judgment as may work irreparable injury, the appeal will be dismissed at the costs of the appellant.
North v. *Leathers*, 97.

Where the record does not show a transfer of a right to the plaintiff, the case will be remanded.
Connell v. *Brown*, 111.

A citation of appeal to this court, from a judgment rendered by a justice of the peace, must be issued as if it had been rendered in a District court, otherwise the appeal will be dismissed.
The Mayor et al. of Carrollton v. *Gaillard*, 120.

Where there is no error of law appearing on the face of the record, the case will not be dismissed.
Bouligny v. *Mme. Fortier et ux*, 121.

To obtain damages for a frivolous appeal the appellee must bring himself within the requirements of the law, and claim them in his answer.
Pecoul, Executor, v. *De Mahy*, 126.

APPEAL, *(Continued.)*

When a co-defendant does not join in the appeal, his status cannot be inquired into.
Roman v. *Denny,* 126.

On an appeal from an order of seizure and sale, the legality of the order only can be examined. Other irregularities must be corrected in the court *a quo.*
Ibid.

Where documents offered in evidence below are not to be found on the record, the appeal will be dismissed.
Hall v. *Beggs et als.,* 130.

Damages for a frivolous appeal must be asked for in the answer of the appellee.
Frost v. *Garrett & Winne et als.,* 134.

Where the note sued on bears eight per cent. interest, no special damages will be allowed as for a frivolous appeal, and this court will simply affirm the judgment of the court below.
Harris v. *Peel,* 140.

Any amendment of the judgment in the court below must be prayed for in the answer to the appeal; it will not be noticed in the brief.
Hite v. *Barker,* 141.

An appeal will lie from a judgment on a rule in the court below dismissing an opposition to an order of seizure and sale.
Heft v. *Kelty,* 143.

Where the judge of the court below gives judgment for the plaintiff, but makes no allusion to the plea in reconvention, set up by the defendant, it is an irregularity, and the case will be remanded.
Sientes v. *Odier & Co.,* 153.

Where no evidence appears on the face of the record to show why a rule taken to set aside an injunction against an order of seizure and sale should not be made absolute, the judgment of the lower court to that effect will be affirmed.
Mrs. Wheeler v. *Stewart,* 167.

Where the note sued on bears eight per cent. interest, and the judgment below is for the same rate of interest, no damages will be accorded as for a frivolous appeal.
Saloy v. *Gubernator et al.* 169.

Where the defendant is cited personally, and as president of a company, and answers for himself alone, there is no issue joined, and the case will be remanded.
City of Jefferson v. *Kaiser et al.* 176.

If the appellee demand the reversal of any part of the judgment, or damages against the appellant, he must file his answer at least three days before that fixed for the argument, otherwise it shall not be received.
Barrett v. *Donovan et al.* 182.

APPEAL, *(Continued.)*

Where the appeal is taken within the usual delay, and security offered, a mandate will issue compelling the judge *a quo* to send up the appeal, if the case is not within the exceptions mentioned in Article 580 of the Code of Practice.
State v. *Judge Third District Court,* 186.

An appellant may be relieved when he has been prevented by circumstances beyond his control from obtaining and filing the transcript of appeal, although the clerk's certificate has been delivered to the appellee.
Wright & Co. v. *Brander, Sr., et al.,* 187.

The absence of counsel furnishes no cause for excuse for not complying with the forms of the law.
Ibid.

Where the suit was originally for more than three hundred dollars, but a part was remitted so as to reduce it below that amount, this court cannot entertain jurisdiction. But where a reconventional demand is set up for an amount over three hundred dollars, the court will hear the defendant's appeal on *that*.
Widow Vincent v. *Schweitzer,* 199.

No appeal will lie, except as regards minors, after a year has expired, *to be computed from the day on which the final judgment was rendered.*
Hall v. *Beggs,* 238.

A second appeal may be granted when the first has been dismissed without a decision on its merits.
Ibid.

Where an appeal was *taken* in the court *a quo,* the fact that no appellate court existed would not interrupt the prescription. It might be otherwise if there had been no judge in the lower court to grant an appeal.
Ibid.

When a judge of an inferior court refuses to decide on the rights of litigants, this court cannot issue the mandate applied for to secure its appellate jurisdiction; nor when he decides adversely to the pretentions of a party. The reasons which he may give for his judgment cannot give this court original jurisdiction.
The State, on the relation of Alter v. *Judge 4th D. C. of N. O.,* 282.

Our jurisdiction is only appellate, and we cannot correct, except on appeal, the judgments of other courts. Const. Art. 70.
Ibid.

The legislature has provided the manner by which an appeal may be taken. It is not by *mandamus.* *Ibid.*

APPEAL, *(Continued.)*

When the creditors of a succession, or an insolvent estate, who have an important interest in maintaining a judgment, have not been cited, nor their citation asked for by appellant, the appeal will be dismissed.
Succession of Constance Perret, 302.

The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below. C. P. Art. 895. If, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court, *as containing all the testimony adduced,* the Supreme Court can only judge of such cause on a statement of facts prepared and signed in the manner directed in the second section of the sixth chapter of the preceding title, or on a written exception to the opinion of the judge, or on a special verdict; and, in the absence of all these, it shall reject the appeal, with costs; but this is to be understood with such modifications as are contained in the following articles. (896–7).
Kearny v. *Nixon et als.,* 318.

One, whether a party or stranger to the cause, may appeal from a final judgment, if he allege that he is aggrieved thereby; and, from an interlocutory judgment, when such judgment may cause him an irreparable injury; provided the amount or value in dispute is sufficient, and the party is not debarred by his own act from taking an appeal.
The State, ex rel. Mead, v. *Judge 3d. Judicial District.,* 320.

This court has only appellate jurisdiction. It is not vested with the power of correcting decrees of other courts, except on appeal. See Const. Art. 70.
State. ex rel. Gonegal, v. *Judge 3d Dist. Court of N. O.,* 328.

It has no authority to take original jurisdiction of the case, substitute its opinion for that of the judge of the lower court, and force him to pronounce its opinion, not his own, on the rights of the parties.
Ibid.

ATTACHMENT.

Where parties are not shown to have been in actual or constructive possesion, as *owners* of the property at the time it was attached, they have not the right to bond it.
Letchford & Co. v. *Jacobs et als.,* 79.

The intervention may stand, although the motion to bond by the intervenors be dismissed.
Ibid.

Until goods have been received and reshipped, or until the receiver had notified the eventual consignees that they would be forwarded according to instructions, they must be considered as under the control of the receiver, and, of course, liable to attachment by their creditors.
Von Phul, Waters & Co. et al. v. *Powell & Co.,* 165.

ATTACHMENT, *(Continued.)*

The creditors of a consignor can attach merchandize, or its proceeds, in the hands of the consignee, until the instructions, verbal or written, to pay the proceeds of sale to a third party have been communicated to, and the stipulation in his favor accepted, by him. The principle is, that the consignee must come under direct obligation to the assignee.
Relf & Co. v. *Boro et al.*. 258.

There is no such interest shown in a third party as to require him to be cited; nor to make it unsafe for garnishees to pay as ordered.
Ibid.

ATTORNEY AT LAW.

The absence of counsel furnishes no cause for excuse for not complying with the forms of the law.
Wright & Co. v. *Brander, Sr. et al.*, 187.

BAILMENT.

A depository is not answerable, in any case, for acts produced by overcoming force, such as fire; unless he failed to use proper diligence.
McCullom v. Porter et als., 89.

No bailee is responsible for not insuring goods under his charge, unless he has instructions so to do.
Duncan v. *Boyé*, 273.

BANKRUPTCY.

See INSOLVENCY.

BANKS AND BANKING.

In the absence of any special agreement or understanding between a banker and a depositor, where the deposit is an irregular one; when an open account is kept; where moneys are deposted in bank to be drawn out, not in the indentical funds deposited; where moneys deposited are mingled with the cash assets of the bank, and used indifferently with his own; the relations between a bank and its depositors are well and definately fixed by our own law and jurisprudence, and by that of other countries, in which business is transacted with such institutions.
Schmidt v. *Barker*, 261.

Such deposits are not real deposits, but are loans for use to the banker. The money so deposited transfers the property to the loanee; and the relation between a bank and its customers, in regard to irregular deposits so made, is simply one of debtor and creditor.
Ibid.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

The owner of any promissory note, bond, or written obligation, for payment of money to order, or bearer, or transferrable by assignment, shall have the right to collect the whole amount of such

BILLS OF EXCHANGE AND PROMISSORY NOTES, *(Continued.)*

promissory note, bond, or written obligation, notwithstanding such note, bond or written obligation may include a greater rate of interest or discount than eight per cent. per annum, provided such obligations shall not bear more than eight per cent. interest per annum after their maturity.

Weaver v. *Kearny & Blois*, 326.

The evident object of the legislature in passing these acts was, that there should be no stipulation for interest exceeding the rate of eight per cent., unless the parties contracting for a greater rate of interest on a valid claim should add the interest to the claim in making the amount of the written obligation. It did not design that the usurious interest, included in a written obligation, stipulated for another debt, not included therein, should be collected.

Ibid.

BONDS.

See Practice.
See Executors and Administrators.
See Courts.

BROKERS.

See Principal and Agent.
See Mandate.

CITATION.

See Practice.

CLERKS OF COURT.

The clerk of a court has a right to demand security for the cost of the transcript of appeal. He is not forced to rely upon the uncertain security of an appeal bond.

The State v. *Behrens, Clerk, &c.*, 67.

COMMON CARRIERS.

Any accident, except such as impossible to be foreseen or avoided, that may happen to any steamboat from running into or afoul of another boat; or, whenever an accident happens from the boat being overloaded, the owner of the boat causing such accident shall be responsible for all loss and damage as a common carrier, and also subject to fine and imprisonment.

Creen et al. v. *Croce et al.*, 3.

Where articles of greater value are packed in the same box with ordinary freight it does not change their character, and will not relieve the common carrier from liability for their loss, if those more valuable goods are not lost.

Hyde & Goodrich v. *N. Y. & N. O. Steamship Co.* 29.

Common carriers are not liable for damages occasioned by accidental and uncontrollable events.

Cochran & Hall v. *Bark Cleopatra et als.*, 270.

COMMON CARRIERS, *(Continued.)*

Carriers or watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events.
Medina & Clohecy v. *Hanson*, 290.

The shipper is not bound to disclose the value of the goods, unless asked; but the carrier has the right to inquire, and to have a true answer; and, if deceived, he will not be responsible. If he make no inquiry and no artifice mislead him, he will be responsible for any loss, however great the value of the articles.
Levois v. *Gale, Capt., and owners of ship R. D. Shepherd*, 302.

See SHIPPING.

CONFLICT OF LAWS.

When a person dies, leaving property in two or more States or countries, his property in each State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto.
Burbank, Curator, v. *Payne & Harrison*, 15.

It is the deliberate opinion of this court that the powers of administrators, appointed in different States, extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions.
Ibid.

Fiduciary agents cannot transfer negotiable assets without an order of court.
Ibid.

Foreign laws must be proved as facts, and, in the absence of such proof, the rights of parties who claim, and the effect and validity of instruments executed under the laws of another State, must be determined by our own, which will be presumed the same.
Syme v. *Stewart*, 73.

Contracts are governed by the law of the place where they are entered into. The forms, the effects, and the prescription of actions are governed by the law of the place where they are brought. C. P. 13.
Pecquet v. *Pecquet's Executor et al.*, 204.

An exception to the general rule, that a foreign law must be proved in our courts, is made when that law was once the law of this State.
Ibid.

The laws of France must be proved; because, having been abrogated as the prevailing general law of the province many years prior to our acquisition of Louisiana, and never thereafter adopted as such, we do not possess judicially the means of knowing what French laws in particular were retained by Spain, and handed down to us.
Ibid.

CONFLICT OF LAWS, *(Continued.)*

A sale which is valid by the laws of the country where it is made, is valid everywhere. The *lex loci contractus* must govern.
Fell v. *Darden & Co.*, 236.

CONSTITUTION.
See APPEAL.

CONTINUANCE.
See COURTS.
See PRACTICE.

CONTRACTS.

Where there is no fixed price for a lease, or it be left to the award of a third person, unnamed and determined, the agreement was an essential ingredient to make it a legal contract.
Haughery v. *Lee*, 22.

Agreements will be construed by the acts of the parties making them.
Fregerio v. *Mrs. Stillman*, 23.

Suretyship is restrained within the limits expressed and intended by the contract.
Grieff & Co. v. *Kirk et als.* 25.

Where the parties to a contract, by mutual consent, enter into a new agreement, as regards some part of it, proof of the latter agreement may be made by parol.
Leeds & Co. v. *Fassman.* 32.

A party must be put *in mora* in order to be made liable for a suit in damages on a contract. And this applies to the reconventential as well as to direct actions.
Ibid.

Where sub-contractors deliver defective work to the contractor, who receives it in that condition, and it causes damage to another, they will all be held liable *in solido* for the amount of the damage so caused.
Carey v. *Courcelle et als.*, 108.

The city's acceptance of the work, for which it was authorized to contract, is *prima facie* evidence of its completion and mode of execution against the front proprietor, who becomes thereby bound.
City of New Orleans v. *Ferriere et als.*, 183.

In contracts to be performed at a future period, the obligation which grows out of the contract arises at the very moment of making it, but the right of action growing out of it arises only when the stipulated term has arrived.
Ibid.

A proposition should always be interpreted *secundum subjectam materiam.*
Commercial Waterworks v. *City of New Orleans*, 190.

CONTRACTS, *(Continued.)*

When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both or by one, with the express or implied assent of the other, furnishes a rule for its interpretation. In a doubtful case the agreement is interpreted against him who has contracted the obligation.
Ibid.

Where there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action. So, where a defendant accepted and used a steamboat, without objection, he can still recover from the plaintiff damages in reconvention, on a contract unskillfully executed.
Conery v. *Noyes*, 201.

An obligation *in solido* is not presumed; it must be expressly stipulated. This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law.
Pecquet v. *Pecquet's Executor et al.*, 204.

A person may, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract cannot be revoked.
Ibid.

Where a damaged article has been received and used by the contractor, knowingly, he cannot repudiate his contract, much less claim damages arising from injury sustained by its use.
Cazelar, Jr., v. *Walker*, 236.

Where a party comes into possession of property by *dation en paiement*, places his own clerk and other employees upon it, although he retains his transferror as a manufacturer, the contract will be valid, and it cannot be seized for the debts of the latter.
Miltenberger & Co. v. *Parker, Sheriff, et al.*, 254.

In an act of sale, a stipulation for another gives him, as to the sum due to him, all the rights and privileges which the vendor himself could exercise on the property sold.
Succession of Ferguson. 255.

Legal agreements having the effects of laws upon the parties, none but the parties can abrogate or modify them; and it is incumbent on courts to give legal effect to all such contracts, according to the true intent of all the parties.
Schmidt v. *Barker*, 261.

This court has often held that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it, without any plea, at any stage of the

CONTRACTS, *(Continued.)*

proceedings. Parties cannot be heard who ask relief from a violation of law. The law leaves them where their conduct has placed them, and *in pari causa melior est conditio possedentis.*

Ibid.

Every condition of a thing impossible, or *contra bonos mores*, or prohibited by law, is null, and renders void the agreement which depends on it.

Ibid.

He who binds himself unwillingly, and under constraint, is not deemed, in the eye of the law, a participant in an illicit covenant.

Ibid.

If, from the plaintiff's own stating, the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid.

Ibid.

The rule of law is *caveat emptor;* and, where a party purchases an article, on inspection, he cannot afterwards complain of the consequences of his own act.

Catharine McGuire, Tutrix, v. *Kearny, Blois & Co.*, 295.

When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply those principles to determine what ought to be the incidents to a contract, which are required by equity.

Fassey v. *The City of New Orleans*, 299.

All agreements relative to personal property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved by at least one credible witness, and other corroborating circumstances.

Moore v. *City of New Orleans*, 312.

CORPORATIONS.

The statutes and regulations which corporations enact for their police and discipline, are obligatory upon all their respective members, who are bound to obey them, provided such statutes contain nothing contrary to the laws of public liberty, or to the interest of others.

German Evangelical Congregation of Lafayette v. *Pressler*, 127.

There is one principle common to the trustees of all incorporated churches. They have the possession and the custody of the temporalities of the church. They are considered *virtute officii* entitled to the possession, and are lawfully seized of the grounds, buildings and other property belonging to the church. Though they hold the church property in trust for the congregation, still, it is their posses-

CORPORATIONS, *(Continued.)*

sion, and the courts are bound to protect them against every irregular and unlawful intrusion, made against their will, whether by the pastor, members of the congregation, or by strangers.

Ibid.

COSTS.

See Appeal.

COURTS.

A judge may affix his signature to an order out of his territorial jurisdiction, where such an order can be granted in chambers, upon an *ex parte* application.

Succession of Weigel, 70.

Where an acting judge signed an order as "Judge of the Second District Court," omitting the word "judicial," *Held:* That it was sufficient.

Millaudon v. *Davis*, 85.

The reasoning and the opinion of a court upon a subject, on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject matter be definitely disposed of by *the decree* of the court.

Davis v. *Millaudon, agent*, 97.

To recover damages plaintiff must make his claim certain ; to make it only probable is not enough. But, when this is not done, the judgment below should not be final, but one of non-suit.

Smith v. *Thielen, Exec'r*, 239.

A party cannot be called into court and then have his capacity to stand in judgment questioned.

Baker v. *Michinard*, 251.

A judge cannot exercise his discretion relative to the time of the trial of cases. The legislature has established the terms of the courts. Neither can he refuse a judgment by default at the proper time; or grant a continuance, without the forms of law being strictly complied with. The judiciary is not invested by the constitution with legislative powers, and cannot deprive the citizen, by its rules, of his legal rights.

State, ex relatione of Tooreau, v. *Hon. R. T. Posey*, 252.

When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must apply those principles to determine what ought to be the incidents to a contract, which are required by equity.

Fassey v. *The City of New Orleans*, 299.

This court has only appellate jurisdiction. It is not vested with the power of correcting decrees of other courts, except on appeal. See Const. Art. 70.

The State ex rel. Gonegal v. *Judge Third District Court of N. O.* 328.

COURTS, *(Continued.)*

It has no authority to take original jurisdiction of the case, substitute its opinion for that of the judge of the lower court, and force him to pronounce its opinion, not his own, on the rights of the parties.
Ibid.

CRIMINAL LAW.

A bill of indictment for manslaughter will not lie unless brought within one year after the offence shall have been made known to the public officer having the power to direct the investigation.
The State v. *Freeman et al.*, 69.

And so as regards all criminal offences, except wilful murder, arson, robbery, forgery and counterfeiting.
Ibid.

The only verdict, in a criminal case, that the jury can render, under the law, is a general one: a verdict of guilty or not guilty, which is a decision both on the law and the facts.
State v. *Jurche*, 71.

By the Court.—It, doubtless, would be a safe rule for the jury to take the law from the judge as their guide; but they are not bound to to do so. They have the right to judge of both the law and the facts in forming their verdict.
Ibid.

DAMAGES.

For the deprivation of the use and occupation of a store, on a claim for consequential damages, plaintiffs must establish the facts, and also the extent of damages suffered thereby.
Bromberg & Son v. *Hyde & Goodrich*, 18.

Employers are answerable for the damage occasioned by their servants, in the exercise of the functions in which they are employed.
Choppin v. *N. O. & C. R. R. Co.*, 19.

Damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party.
Ibid.

Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it.
Durbridge v. *Wentzel et al.*, 20.

Where the parties to a contract, by mutual consent, enter into a new agreement, as regards some part of it, proof of the latter agreement may be made by parol.
Leeds & Co. v. *Fassman*, 32.

A party must be put *in mora* in order to be made liable for a suit in damages on a contract. And this applies to reconventional as well as to direct actions.
Ibid.

DAMAGES, (*Continued.*)

Malicious slander will be punished by damages, and the verdict of the jury and judgment of the court below sustained.
Mohrman v. *Ohse*, 64.

Where sub-contractors deliver defective work to the contractor, who receives it in that condition, and it causes damage to another, they will all be held liable *in solido* for the amount of the damage so caused.
Carey v. *Courcelle et als.*, 111.

When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery, or damages, in case of the non-execution of the contract.
Seris v. *Bellocq, Noblom & Co.*, 146.

If the object to be given is uncertain, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered.
Ibid.

Damages are properly assessed by the judge *a quo* at the time the defendants were put in default.
Ibid.

Where there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action. So, where a defendant accepted and used a steamboat, without objection, he can still recover from the plaintiff damages in reconvention, on a contract unskillfully executed.
Conery v. *Noyes*, 201.

Where a damaged article has been received and used by the contractor, knowingly, he cannot repudiate his contract, much less claim damages arising from injury sustained by its use.
Cazelar, Jr, v. *Walker*, 236.

The measure of damages is the amount of loss the plaintiff has sustained, and the profit of which he has been deprived, with the qualifications stated in Article 1928 C. C.
Smith v. *Thielen, Ex'r.*, 239.

To recover damages plaintiff must make his claim certain; to make it only probable is not enough. But, when this is not done, the judgment below should not be final, but one of non-suit.
Ibid.

The act of 18th March, 1855, for a suit in damages, under Art. 2294, is a legal subrogation in favor of the persons there designated, to the right of action of the deceased sufferer, and the plaintiff must allege his cause of action as derived from the deceased.
Earhart v. *N. O. & C. R. R. Co.*, 243.

DAMAGES, *(Continued.)*

Common carriers are not liable for damages occasioned by accidental and uncontrollable events.
Cochran & Hall v. *Bark Cleopatra et als.*, 270.

No bailee is responsible for not insuring goods under his charge, unless he has instructions so to do.
Duncan v. *Boye*, 273.

Carriers or watermen may be liable for the loss or damage of the things intrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental or uncontrollable events.
Medina et al. v. *Hanson*, 290.

If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages.
Foucher v. *Choppin*, 321.

DATION EN PAIEMENT.

Where a party comes into possession of property by *dation en paiement*, places his own clerk and other employees upon it, although he retains his transferror as a manufacturer, the contract will be valid, and it cannot be seized for the debt of the latter.
Miltenberger & Co. v. *Parker, Sheriff, et al.*, 254.

DEBTOR AND CREDITOR.

Article 2199 of the Civil Code applies when there is a solidarity as between the co-debtors; and can only be invoked when a creditor, by discharging one, deprives the co-debtor of his recourse upon the one discharged.
Lynch v. *Leathers, et als.*, 118.

In the transfer of debts, rights or credits to third parties, the delivery takes place between the transferror and transferree by the giving of the title.
Relf & Co. v. *Boro*, 258.

The transferree is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferree may, nevertheless, become possessed by the acceptance of the transfer by the debtor in an authentic act.
Ibid.

The property of the debtor is always held liable to his creditors until a full and complete transfer and tradition is made to the purchaser.
Ibid.

DEFAULT.

See CONTRACTS.

See SALE.

See PRACTICE.

DEPOSIT.

A depository is not answerable, in any case, for acts produced by overcoming force; such as fire, unless he failed to use proper diligence.
McCollum v. *Porter et als.* 89.

DOMICIL.

If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment or his habitual residence. If his residence in each appear to be nearly of the same nature, in such case, he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicil. This intention is proved by an express declaration of it before the judges of the parishes from which, and to which, he shall intend to remove. If this declaration is not made, this intention shall depend on circumstances.
Taylor v. *Bach,* 61.

DONATIONS.

No testament can have effect unless it has been presented to the judge of the parish in which he died, if he died within the State; therefore, an executor in possession of a will has the right to have a nuncupative will registered and executed, although the estate had been fully administered and the property delivered into the possession of the legal heir. It is not necessary that he should, nor can he, resort to a direct action of nullity, until the testament is ordered to be executed.
The State v. *The Judge of the Second District Court of N. O.* 189.

If a donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects to be given, the donation, though not accepted in express terms, has full effect.
Pecquet v. *Pecquet's Exr's et al.* 204.

DOWRY.

See Marriage.
See Donation.

EMANCIPATION.

See Slaves and Statu Liberi.

EQUITY.

See Courts.

ERROR OF LAW.

In order to entitle the payer to recover back money paid by mistake, it must have been paid to a person to whom he did not owe it. *Repetitio nulla est ab eo qui suum recepit.*
Sientes v. *Odier & Co.,* 153.

EVIDENCE.

Where a witness is merely a nominal party to the suit, and disclaims any personal interest therein, he is competent.
Creen et al. v. *Croce et al.,* 3.

EVIDENCE, *(Continued.)*

A towboat's private book of rules and regulations cannot be received in evidence even when accompanied by oral testimony.
Ibid.

Where there is positive evidence of the loss of an instrument in writing, parol testimony will be received proving its contents.
Billen v. *White*, 10.

Where evidence was received without objection by way of reconvention, it will be sustained as if a formal plea to that effect had been filed.
Kean v. *Brandon et al.*, 37.

Evidence of fraud, etc., in an action on a policy of insurance, can only be admitted when specially pleaded; it is not admissible under the plea of the general issue.
Mrs. Flynn v. *Merchants' Mutual Insurance Co.*, 135.

What third persons said out of court, and oral testimony of criminal proceedings, is not the best evidence, and inadmissible.
Ibid.

Where a criminal charge is to be proved by circumstantial evidence, the proof ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.
Ibid.

Where the testimony, as to the amount of a certain portion of the goods destroyed, is vague and uncertain, that part will be reserved for further action.
Ibid.

The law requires the same amount of evidence to prove a verbal power of attorney as it does to prove a verbal contract for money or personal property; and that, when a party attempts to enforce a contract for the payment of money, above $500, made by agent, he should prove, by at least one credible witness and other corroborating circumstances, the verbal agency.
Gardes et als. v. *Schroeder & Schreiber*, 142.

The whole tendency of modern practice, is to enlarge the admissibility of evidence, leaving the court to restrict its applicability.
Kaiser v. *New Orleans*, 178.

Legal presumption is that which is attached, by a special law, to certain acts or to certain facts; such as the weight which the law attaches to the confession of the party, or to his oath.
Widow Betat et al. v. *Mougin*, 289.

The neglect or failure of one party to prove what is essential to his recovery, is not cured by the evidence of the other, leaving the fact doubtful.
Briggs v. *Simonds*, 294.

EVIDENCE, *(Continued.)*

All agreements relative to personal property, and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements, above five hundred dollars in value, must be proved by at least one credible witness, and other corroborating circumstances.
Moore v. *City of New Orleans*, 312.

EXECUTION OF JUDGMENT.

See WARRANTY. *N. O.* v. *Ferriere.*

EXECUTORS AND ADMINISTRATORS.

When a person dies, leaving property in two or more States or countries, his property in each State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto.
Burbank, curator, v. *Payne & Harrison*, 15.

It is the deliberate opinion of this court that the powers of administrators, appointed in different States, extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions.
Ibid.

Fiduciary agents cannot transfer negotiable assets without an order of court.
Ibid.

The laws establishing *the order* of successions, and those which treat of *their administration*, are essentially different.
Succession of Lumsden, 38.

An inheritance remains without an heir and in abeyance until the rightful heir accepts or rejects it, according to the Article 1026, C. C., giving him time for deliberation. Such an heir has but a residuary interest. C. C. 1066.
Ibid.

EXECUTORY PROCESS.

The order of the court directing the executory process must be strictly in accordance with the authentic act; items not embraced therein will be stricken out, and the decree sustained for the express conditions of the mortgage.
Pele, Executor, v. *Meaux*, 58.

EXPROPRIATION.

See PUBLIC USE.

FRAUD.

A creditor of an insolvent debtor who opposes the appointment of syndic, or charges fraud against the debtor, must do so within ten days next following the meeting of creditors, by written opposition, before the court, stating specially the several facts of nullity of the

FRAUD, *(Continued.)*

appointment or fraud alleged against the insolvent debtor. Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender.
Nimick, McCloskey & Co. v. *Ingram*, 85.

The acceptance for the creditors by the court vests in them all the rights and property of the insolvent, whether placed on the schedule or not; and the syndic may sue to recover them; but any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representatives, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim.
Ibid.

GARNISHEE.

Garnishees, being stakeholders, are liable only for the sum which they owe the defendants, and should not be made to pay interest until they are in default, as the garnishment process prohibits them from paying until ordered by the court. They are required to pay the attaching creditors only such sum as they may owe the defendants on a full and final settlement of their accounts.
Clark, Bros. & Co. v. *Powell & Co.* 177.

In the transfer of debts, rights or credits, to third parties, the delivery takes place between the transferror and transferree by the giving of the title.
Relf & Co. v. *Boro*, 258.

The transferree is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place. The transferree may, nevertheless, become possessed by the acceptance of the transfer by the debtor in an authentic act.
Ibid.

The property of the debtor is always held liable to his creditors until a full and complete transfer and tradition is made to the purchaser.
Ibid.

The creditors of a consignor can attach merchandize, or its proceeds, in the hands of the consignee, until the instructions, verbal or written, to pay the proceeds of sale to a third party have been communicated to, and the stipulation in his favor accepted by, him. The principle is, that the consignee must come under direct obligation to the assignee.
Ibid.

There is no such interest shown in a third party as to require him to be cited; nor to make it unsafe for garnishees to pay as ordered.
Ibid.

HUSBAND AND WIFE.

Where a married woman is separated from her husband in property, and doing business as a public merchant, she cannot plead that the draft accepted by her did not inure to her personal benefit.
Levy v. *Rose*, 113.

The judgment of separation of property is valid, although the wife fails to prove, when attacked by the creditors of the husband, that he was indebted to her for the full amount for which she obtained judgment against him. The creditor can then only contest the amount of her judgment.
Brown v. *His Creditors*, 113.

All property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage, or to belong to her at the time of the marriage, is paraphernal.
Pecquet v. *Pecquet's Executor et al.*, 204.

The wife has the right to administer personally her paraphernal property, without the assistance of her husband.
Ibid.

The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him.
Ibid.

The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits, as above expressed.
Ibid.

All persons have the capability to contract, except those whose incapacity is specially declared by law. These are persons of insane mind, slaves, those who are interdicted, minors, married women.
Ibid.

The incapacity of the wife is removed by the authorization of the husband, or in cases provided by law, by that of the judge.
Ibid.

The authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name; to her contracts for necessaries for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them.
Ibid.

The unauthorized contracts made by married women, like the acts of minors, may be made valid, after the marriage is dissolved, either by express or implied assent.
Ibid.

Where the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property whether natural, civil, or the result of labor, belong to the conjugal part-

HUSBAND AND WIFE, *(Continued.)*

nership, if there exist a community of gains. If there do not, each party enjoys as he chooses, that which comes to his hands; but the fruits and revenues which are existing at the dissolution of the marriage, belong to the owner of the things which produce them.

Ibid.

The acknowledgment of a debt by the wife, without his express authority, will not bind the husband, unless she herself is a public merchant; nor can she bind herself for his debt by such an acknowledgment.

Bower & Garner v. *Frindell and Wife*, 299.

INJUNCTION.

An injunction is said to be a mandate obtained by plaintiff, prohibiting one from doing an act which, he contends, may be *injurious* to him, or *impair* a right which he claims. C. P. Art. 296. It is a conservatory act, an equitable remedy, which a party may obtain provisionally, on bringing his action. C. P. Art. 208. And, in order to obtain it, the party applying for the same must *state, under oath, the facts which*, according to his belief, *render an injunction necessary.*

Terry v. *Stauffer*, 306.

INSOLVENCY AND INSOLVENT PROCEEDINGS.

A sale of partnership property by one of the commercial partners, on the eve of his insolvency, is null and void, and will be set aside. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and, if not fully paid, they may pursue each member, although without privilege.

Saloy, Syndic, v. *Albrecht*, 75.

The partnership is dissolved by the *cessio bonorum* made by one of its members; and the solvent partner, being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs. If there is a surplus over the insolvent estate, it goes to his individual creditors.

Ibid.

A creditor of an insolvent debtor who opposes the appointment of syndic, or charges fraud against the debtor, must do so within ten days next following the meeting of creditors, by written opposition, before the court, stating specially the several facts of nullity of the appointment or fraud alleged against the insolvent debtor. Any informality in the proceedings, when questioned, must be by direct action. No creditor will be permitted to disregard and treat as an absolute nullity a judgment accepting a surrender.

Nimick, McCloskey & Co. v. Ingram, 85.

The acceptance for the creditors by the court, vests in them all the rights and property of the insolvent, whether placed on the

INSOLVENCY AND INSOLVENT PROCEEDINGS, *(Continued.)*

schedule or not; and the syndic may sue to recover them; but any creditor may show, provided it be contradictorily with the mass of the creditors, or their legal representatives, that any particular object or fund is not embraced in the surrendered estate, but is subject exclusively to his individual claim.

Ibid.

Where, in complicated accounts between the syndic and creditors, the court *a quo* appointed an umpire to decide, and an accountant to investigate the accounts, the judgment will be affirmed.

Diverges v. *His Creditors,* 112.

A creditor placed upon the *bilan* for more than is due to him, is not a fraudulent act of the debtor; particularly if not so charged in opposition.

Brown v. *His Creditors,* 113.

In cases of insolvency, all the ordinary debts, even those not due, are on an equality and must be paid proportionally.

Union Bank of Tennessee v. *Bullitt, Miller & Co.* 323.

INSURANCE.

Where an abandonment for a total loss is notified, by the master, to the underwriters, and accepted by their agent, it is binding, and passes the property to the insurers, if otherwise valid.

Graham & Boyle v. *Ledda,* 45.

The necessity for a sale of a vessel cannot be denied, when the peril, in the opinion of those capable of forming a judgment, make a loss probable, though the vessel may, a short time afterwards, get afloat.

Ibid.

The ratification of an abandonment to the agent of the underwriters dates back to the time of the act or contract ratified.

Ibid.

An insurance company will not be liable because the firewarden advised the removal of property from a burning building, and it was stolen during the transit.

Fernandez v. *Merchants' Mutual Insurance Company,* 131.

Evidence of fraud, etc., in an action on a policy of insurance, can only be admitted when specially pleaded; it is not admissible under the plea of the general issue.

Flynn v. *Merchants' Mutual Insurance Company,* 135.

What third persons said out of court, and oral testimony of criminal proceedings, is not the best evidence, and inadmissible.

Ibid.

Where a criminal charge is to be proved by circumstantial evidence, the proof ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.

Ibid.

INSURANCE, *(Continued.)*

Where the testimony, as to the amount of a certain portion of the goods destroyed, is vague and uncertain, that part will be reserved for further action.

Ibid.

INTERPRETATION.

The words of a law are to be understood in their most known and usual signification, without attending so much to the niceties of grammar rules as to the general and popular use of the words; and, where its expressions are dubious, its true meaning is to be discovered by considering the reason and spirit of it, or the cause which induced the legislature to enact it.

Dejona, f. w. c. v. *Steamboat Osceola et als.* 277

INTEREST.

Where the note sued on bears eight per cent. interest, no special damages will be allowed as for a frivolous appeal; and this court will simply affirm the judgment of the court below.

Harris v. *Peel,* 140.

Conventional interest will not be allowed on a contract unless expressly stipulated.

Stephens v. *Beard,* 145.

The holder of a note for the payment of money, according to the act approved March 20th, 1856, can only recover eight per cent. interest, notwithstanding the rate of interest agreed upon may be beyond eight per cent.

Williams v. *Halsmith,* 200.

The owner of any promissory note, bond, or written obligation, for payment of money to order, or bearer, or transferrable by assignment, shall have the right to collect the whole amount of such promissory note, bond or written obligation, notwithstanding such note, bond or written obligation may include a greater rate of interest or discount than eight per cent. per annum, provided such obligations shall not bear more than eight per cent. interest per annum after their maturity.

Weaver v. *Kearny & Blois,* 326.

The evident object of the legislature in passing these acts was, that there should be no stipulation for interest exceeding the rate of eight per cent., unless the parties contracting for a greater rate of interest on a valid claim should add the interest to the claim in making the amount of the written obligation. It did not design that the usurious interest, included in a written obligation, stipulated for another debt, not included therein, should be collected.

Ibid.

INTERROGATORIES ON FACTS AND ARTICLES.

The law requires the proof of sale of immovable property to be in writing; but when actual delivery has been made, a verbal sale or

INTERROGATORIES ON FACTS AND ARTICLES, *(Continued.)*

other disposition of such property may be proved by interrogatories propounded to either vendor or vendee, the reply to which would be a confession of title. No other kind of questions are permitted.

Haughery v. *Lee*, 1.

Answers to interrogatories are not required to be made in any peculiar set phrases, so that they are responsive.

Ibid.

See Evidence.

INTERVENTION.

See Practice.

JUDGMENT.

Where there is not in the transcript of appeal either a final judgment, signed by the judge, or such interlocutory judgment as may work irreparable injury, the appeal will be dismissed, at the costs of the appellant.

North v. *Leathers*, 97.

A party cannot recover judgment on notes not yet due at the time of filing the petition, unless the affidavit is made in conformity to law.

Osborne & Tolle v. *Powell & Co.* 169.

JURIES AND JURORS.

The verdict of a jury will not be disturbed, except for good cause, and damages will be allowed on an appeal from a judgment thereon.

Field & Shackleford v. *Campbell*, 30.

The verdict of a jury, and consequent judgment thereupon, will not be disturbed, except for solid reasons.

Oliver v. *Randolph*, 50.

The only verdict, in a criminal case, that the jury can render, under the law, is a general one: a verdict of guilty or not guilty, which is a decision both on the law and the facts.

State v. *Jurche*, 71.

By the Court.—It, doubtless, would be a safe rule for the jury to take the law from the judge as their guide; but they are not bound to to do so. They have the right to judge of both the law and the facts in forming their verdict.

Ibid.

LAND TITLES.

If any one sells or alienates a piece of land, from one fixed boundary to another fixed boundary, the purchaser takes all the land between such bounds, although it give him a greater quantity of land than is called for in his title, and the surplus exceed the twentieth part of the quantity mentioned in his title.

Surgi v. *Shooter et al.* 68.

LAND TITLES, *(Continued.)*

There can be neither increase or diminution of price on account of disagreement in measure, when the object is designated by the adjoining tenements, and sold from boundary to boundary.

Ibid.

If one sells or alienates a piece of land, from one fixed boundary to another, the purchaser takes all the land between such bounds, although it gives him a greater quantity than his title calls for, and the surplus exceeds the twentieth part mentioned therein. Neither can there be increase or diminution on account of disagreement in measure.

Davis v. *Millaudon*, 97.

LETTING AND HIRING.

Where there is no fixed price for a lease, or it be left to the award of a third person, unnamed and determined, the agreement was an essential ingredient to make it a legal contract.

Haughery v. *Lee*, 22.

A lessee cannot dispute the title of his lessor.

Paquetel, wife of Gavot, v. *Gauche*, 63.

Where there is no special agreement as to the extent of the lease, it is presumed to be monthly.

Ibid.

Where threats and representations, resorted to by a party so that the other was induced to sign a lease and give his notes, which he paid for fear of suit; *Held:* That such threats as these are insufficient to rescind the contract. It is perfectly immaterial to the lessee what was the lessor's right or title to the thing leased. He got under his contract all that he could have acquired from the true owner, quiet and peaceable possession. Ownership is not essential to make a lease valid. He who lets out the property of another warrants the enjoyment of it against the claim of the owner.

Sientes v. *Odier & Co*, 153.

A lessee sued for rent, and in undisturbed possession of the premises under the lease, cannot contest the lessor's title.

Ibid.

In order to entitle the payer to recover back money paid by mistake, it must have been paid to a person to whom he did not owe it. *Repetitio nulla est ab eo qui suum recepit.*

Ibid.

Where the object of the lease was a special one, parol testimony cannot be received to prove that the lessee had the privilege of using it for other purposes.

Ibid.

A judicial sale of a lease imposes upon the purchaser the obligation of paying the price to the vendor, and that of paying the rent accruing after the sale, to the lessor, according to the terms of the lease, and this whether it is so announced in the advertisement or not.

Brinton, syndic, v. *Madame Datas*, 174.

LETTING AND HIRING, *(Continued.)*

The lessor has not the right to make any alteration in the thing let, during the continuance of the lease. In case of a breach of contract, by negligence or fraud of a party, no other sum can be allowed as damages than that which fully indemnifies the creditor.
Kaiser v. *The City of New Orleans*, 178.

If, during the lease, the thing be totally destroyed by an unforeseen event, or if it be taken for a purpose of public utility, the lease is at an end. If it be only destroyed in part, the lessee may either demand a diminution of the price or a revocation of the lease. In neither case has he any claim for damages.
Foucher v. *Choppin*, 321.

LIBEL AND SLANDER.

Malicious slander will be punished by damages, and the verdict of the jury and judgment of the court below sustained.
Mohrman v. *Ohse*, 64.

MANDATE.

A mandate must be express to sue out a writ of sequestration.
Lithgon & Co. v. *Byrne*, 8.

The mandatory, or attorney, is answerable for the interest of any sum of money he has employed to his own use, for the time he has so employed it; and for that of any sum remaining in his hands, from the day he become a defaulter by delaying to pay it over.
Millaudon v. *Lesseps*, 246.

MANDAMUS.

An exception that there was a misjoinder of parties and relators; that the petition shows no interest in, or cause of action on the part of either relator; and that the petition does not set forth and state such a case as would authorize the court to issue a *mandamus*, was properly overruled by the court *a quo*.
State v. *Wrotnowski*, 156.

By the Coart.—Mandamus is necessarily a summary proceeding, and it is very questionable whether, in such a case, the intervention of third persons can be legally maintained.
Ibid.

Where the issuing of this writ would not be consonant with right and justice, or would serve no just or useful purpose, it should not be granted.
Ibid.

Where the appeal is taken within the usual delay, and security offered, a mandate will issue compelling the judge *a quo* to send up the appeal, if the case is not within the exceptions mentioned in Art. 580 of the Code of Practice.
The State v. *The Judge of the 3d D. C. of N. O.* 186.

MANDAMUS, *(Continued.)*

When a judge of an inferior court refuses to decide on the rights of litigants, this court cannot issue the mandate applied for to secure its appellate jurisdiction: nor when he decides adversely to the pretentions of a party. The reasons which he may give for his judgment cannot give this court original jurisdiction.
The State on the relation of Alter v. *The Judge of 4th D. C. of N. O.* 282.

Our jurisdiction is only appellate, and we cannot correct, except on appeal, the judgments of other courts. Const. Art. 70.
Ibid.

The legislature has provided the manner by which an appeal may be taken. It is not by *mandamus.*
Ibid.

A *mandamus* is an order issued in the name of the State, by a tribunal of competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing it to perform some certain act, belonging to the place, duty, or quality with which it is clothed.
Terry v. *Stauffer,* 306.

MARRIAGE.

See Husband and Wife.

MORTGAGES.

The failure to declare in the act of mortgage the exact amount of insurance, does not invalidate the act.
Pele, Executor v. *Meaux,* 58.

The order of the court directing the executory process must be strictly in accordance with the authentic act; items not embraced therein will be stricken out, and the decree sustained for the express conditions of the mortgage.
Ibid.

The act of mortgage is not a negotiable instrument; and, unlike the notes which it secures, when assigned, is subject to all equities between the original parties.
Bougliny v. *Mme. Fortier et ux.* 121.

In actions of revendication of real property, or when proceedings are instituted in order to obtain the seizure and sale of real property, the defendant may be cited either at the place where the property is situated, or where he has his domicil, at the option of the plaintiff.
Roman et als. v. *Denney et als.* 126.

There is no necessity for alleging or proving demand or protest of mortgage notes.
Ibid.

NEGOTIORUM GESTOR.

No man ought to be held responsible for the acts of another, done to his prejudice and against his will. Thus it is held in regard to the *negotiorum gestor*, that the latter must have intended to act in the interest of, and to manage the affairs of another, and not his own; and the management must have been useful at the time.
Woodlief & Legendre v. *Moncure*, 241.

NEW ORLEANS.

In the absence of proof to the contrary, it will be presumed that the city authorities have complied with all the formalities of the law in making a contract: *omnia præsumuntur solemnitur esse acta.*
City of New Orleans v. *Halpin*, 185.

In the absence of proof of fraud, the acceptance by the corporation of work which it was authorized to contract for, is *prima facie* against the defendant, so far as it relates to its completion and the manner in which it was done.
Ibid.

See CONTRACTS.

OFFENCES AND QUASI-OFFENCES.

For the deprivation of the use and occupation of a store, on a claim for consequential damages, plaintiffs must establish the facts and also the extent of damages suffered thereby.
Bromberg & Son v. *Hyde & Goodrich*, 18.

Employers are answerable for the damage occasioned by their servants, in the exercise of the functions in which they are employed.
Choppin v. *New Orleans & Carrollton R. R. Co.* 19.

Damages may be assessed without calculating altogether on the pecuniary loss, or the privation of pecuniary gain to the party.
Ibid.

Every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it.
Durbridge v. *Wentzel et al.* 20.

An insurance company will not be liable because the fire warden advised the removal of property from a burning building, and it was stolen during the transit.
Fernandez v. *Merchants' Mutual Ins. Co.* 131.

Masters and employers are answerable for the damages occasioned by their servants and overseers in the exercise of the functions in which they are employed.
Wichtrecht v. *Fasnacht*, 166.

PARTNERSHIP.

Commercial partners are bound *in solido*, and where such a partnership existed, oral testimony will be received to establish it.
Villa v. *Jonté et al.* 9.

PARTNERSHIP, *(Continued.)*

Where a firm makes advances on consignments, they cannot be required to forward them to third persons subsequently, and thus be deprived of their privilege.
Bowker & Edmonds v. *Connolly & Co.* 12.

A silence of five years in the settlement of partnership accounts will bar any claim for balances.
Succession of Edward Parker, 28.

A sale of partnership property by one of the commercial partners, on the eve of his insolvency, is null and void, and will be set aside. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and, if not fully paid, they may pursue each member, although without privilege.
Saloy, syndic, v. *Albrecht*, 75.

The partnership is dissolved by the *cessio bonorum* made by one of its members; and the solvent partner, being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs. If there is a surplus over the insolvent estate, it goes to his individual creditors.
Ibid.

PLEADING.

Damages will be allowed for a frivolous appeal, when prayed for by the appellee in his answer.
Beaty v. *Schwartz et als.* 11.

Where the appellee does not claim damages *by his answer* for a frivolous appeal, none can be granted.
Cockburn v. *Groves & Co.* 18.

A motion to dismiss an appeal for informality must be made within three judicial days after the record is filed in this court.
Eupheme, f. w. c., et als. v. *Maran et al.* 21.

Where plaintiff fails to claim a balance of account he cannot have judgment therefor. The prayer of the petition is all that the court can decide upon.
Mackey v. *Thompson*, 65.

Where the record does not show a transfer of a right to the plaintiff, the case will be remanded.
Connell v. *Brown*, 111.

Where a married woman is separated from her husband in property, and doing business as a public merchant, she cannot plead that the draft accepted by her did not inure to her personal benefit.
Levy v. *Rose*, 13.

To obtain damages for a frivolous appeal the appellee must bring himself within the requirements of the law, and claim them in his answer.
Pecoul, Executor, v. *De Mahy*, 126.

PLEADING, *(Continued.)*

An exception that there was a misjoinder of parties and relators; that the petition shows no interest in, or cause of action on the part of either relator; and that the petition does not set forth and state such a case as would authorize the court to issue a *mandamus*, was properly overruled by the court *a quo*.
State v. *Wrotnowski*, 156.

By the Court.—Mandamus is necessarily a summary proceeding, and it is very questionable whether, in such a case, the intervention of third persons can be legally maintained.
Ibid.

If the appellee demand the reversal of any part of the judgment, or damages against the appellant, he must file his answer at least three days before that fixed for the argument, otherwise it shall not be received.
Barrett v. *Donovan et al.* 182.

This court has often held that it will not lend its aid to settle disputes relative to contracts reprobated by law. It will notice their illegality *ex officio*, and allow it, without any plea, at any stage of the proceedings. Parties cannot be heard who ask relief from a violation of law. The law leaves them where their conduct has placed them, and *in pari causa melior est conditio possedentis.*
Schmidt v. *Barker*, 261.

Every condition of a thing impossible, or *contra bonos mores*, or prohibited by law, is null, and renders void the agreement which depends on it.
Ibid.

He who binds himself unwillingly, and under constraint, is not deemed, in the eye of the law, a participant in an illicit covenant.
Ibid.

If, from the plaintiff's own stating, the cause of action appears to arise from a transgression of a positive law of the country, the court will not lend their aid.
Ibid.

PRACTICE.

A mandate must be express to sue out a writ of sequestration.
Lithgon & Co. v. *Byrne*, 8.

Commercial partners are bound *in solido*, and where such a partnership existed, oral testimony will be received to establish it.
Villa v. *Jonté et al.* 9.

A co-defendant cannot be made a witness against the plaintiff.
Bell v. *Black et al.* 11.

A plaintiff must make out a clear case before a court of justice.
Ibid.

PRACTICE, *(Continued.)*

Where evidence was received without objection, by way of reconvention, it will be sustained as if a formal plea to that effect had been filed.

Kean v. *Wm. L. Brandon et al.* 37.

If a defendant reside alternately in different parishes, he must be cited in that in which he appears to have his principal establishment or his habitual residence. If his residence in each appear to be nearly of the same nature, in such case, he may be cited in either, at the choice of the plaintiff, unless he has declared, pursuant to the provision of the law, in which of those parishes he intended to have his domicil. This intention is proved by an express declaration of it before the judges of the parishes from which, and to which, he shall intend to remove. If this declaration is not made, this intention shall depend on circumstances.

Taylor v. *Bach,* 61.

If a new trial be prayed for on account of the misconduct of the adverse party, or other causes, the party must accompany his motion by an affidavit of the facts he relies upon.

Paquetel, wife of Gavot, v. Gauche, 63.

Where plaintiff fails to claim a balance of account he cannot have judgment therefor. The prayer of the petition is all that the court can decide upon.

Mackey v. *Thompson,* 65.

Where a party is guilty of laches by not urging his claim in due time and place, he cannot complain in this court.

Tibben v. *Gratia & Co. et al.* 72.

Where a judgment bears eight per cent. interest only five per cent. damages will be allowed for a frivolous appeal.

Lamothe v. *Lamarque,* 77.

Where the appellee moved to dismiss the appeal, that the case having been tried by a jury, no motion was made for a new trial, *Held:* That it is a good reason to affirm the judgment, but cannot be to dismiss the appeal.

Lafrance v. *Martin,* 77.

It is not necessary that more than one of the principals and the surety shall sign an appeal bond.

Ibid.

Where parties are not shown to have been in actual or constructive possession, *as owners,* of the property at the time it was attached, they have not the right to bond it.

Letchford & Co. v. *Jacobs,* 79.

The intervention may stand, although the motion to bond by the intervenors be dismissed.

Ibid.

An error of calculation, patent on the face of the record, made in the court below, will be corrected on appeal without suggestion.

Moores & Co. v. *McConnell,* 84.

PRACTICE, *(Continued.)*

Where an acting judge signed an order as "Judge of the Second District Court," omitting the word "judicial;" *Held:* That it was sufficient.
Millaudon v. *Davis*, 85.

Citation being the essential ground of all civil actions, in ordinary proceeding, the neglect of that formality annuls radically all proceedings had, unless the defendants have voluntarily appeared in the suit and answered the demand.
McCan & Harrell v. *Steamer Golden Age, et als.* 91.

A tender, in open court, of the thing demanded, is an admission that the thing itself is due, and is therefore, inconsistent with the averment that the thing is not due ; neither can defendant withdraw his tender subsequently, so as to effect any rights the plaintiff may have acquired under it.
Davis v. *Millaudon*, 97.

The plea of payment is inconsistent with a general denial, consequently a plea of tender.
Ibid.

The tender of a thing claimed in a suit, when made in the course of judicial proceedings, and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession ; but, where such tender is made, *not of the thing claimed, but of something else*, with a special reservation (if not accepted) of all legal rights, and with the special defence that the thing claimed is not actually due, it has not that conclusive effect.
Ibid.

Article 2199 of the Civil Code applies when there is a solidarity as between the co-debtors ; and can only be invoked when a creditor, by discharging one, deprives the co-debtor of his recourse upon the one discharged.
Lynch v. *Leathers et al.* 118.

A citation of appeal to this court, from a judgment rendered by a justice of the peace, must be issued as if it had been rendered in a District court, otherwise the appeal will be dismissed.
The Mayor et al. of Carrollton v. *Gaillard*, 120.

Where documents offered in evidence below are not to be found on the record, the appeal will be dismissed.
Hall v. *Beggs et als.* 130.

Damages for a frivolous appeal must be asked for in the answer of the appellee.
Frost v. *Garret & Wynne, et als.* 134.

Heirs, while they are not concluded by a tableau of distribution, have yet the right to appear and oppose it.
Succession of Barbour, 133.

PRACTICE, (*Continued.*)

A rule is not the proper mode to dispose of an opposition, when excepted to.
Ibid.

Any amendment of the judgment in the court below must be prayed for in the answer to the appeal; it will not be noticed in the brief.
Hite v. *Barker,* 141.

Until goods have been received and reshipped, or until the receiver had notified the eventual consignees that they would be forwarded according to instructions, they must be considered as under the control of the receiver, and, of course, liable to attachment by their creditors.
Von Phul et als. v. *Powell & Co.* 165.

The article 522 C. P. is directory, and a substantial compliance with its provisions will be sustained, if the verdict is not objected to at the trial by the defendants.
Wichtrecht v. *Fasnacht,* 166.

Where no interest is given by the verdict, the judgment should give none.
Ibid.

Where no evidence appears on the face of the record to show why a rule taken to set aside an injunction against an order of seizure and sale should not be made absolute, the judgment of the lower court to that effect will be affirmed.
Mrs. Wheeler v. *Stewart,* 167.

Where the note sued on bears eight per cent. interest, and the judgment below is for the same rate of interest, no damages will be accorded as for a frivolous appeal.
Saloy v. *Gubernator et al.* 169.

A party cannot recover judgment on notes not yet due at the time of filing the petition, unless the affidavit is made in conformity to law.
Osborne & Tolle v. *Powell & Co.* 169.

Where the defendant is cited personally, and as president of a company, and answers for himself alone, there is no issue joined, and the case will be remanded.
City of Jefferson v. *Kaiser et al.* 176.

The right of either party to a bill of exceptions is reserved to the court, and the court is to pass upon the admissibility of the evidence.
Pecquet v. *Pecquet's Executor et al.* 204.

The only mode pointed out by law, to test, in this court, the correctness of the opinions of inferior courts, is by bill of exceptions, and in no other form can it revise such opinions. It is only when the question decided is presented by the pleadings that a bill of exceptions may be dispensed with.
Ibid.

PRACTICE, *(Continued.)*

Contracts are governed by the law of the place where they are entered into. The forms, the effects, and the prescription of actions are governed by the law of the place where they are brought. C. P. 13.
Ibid.

An exception to the general rule, that a foreign law must be proved in our courts, is made when that law was once the law of this State.
Ibid.

The laws of France must be proved; because, having been abrogated as the prevailing general law of the province many years prior to our acquisition of Louisiana, and never thereafter adopted as such, we do not possess judicially the means of knowing what French laws in particular were retained by Spain, and handed down to us.
Ibid.

A *dilatory exception*, as for instance a premature suit, might have been successfully urged in *limine litis*, but cannot avail a party after a judgment by default.
Ibid.

No appeal will lie, except as regards minors, after a year has expired, *to be computed from the day on which the final judgment was rendered.*
Hall v. *Beggs*, 238.

A second appeal may be granted when the first has been dismissed without a decision on its merits.
Ibid.

Where an appeal was *taken* in the court *a quo*, the fact that no appellate court existed would not interrupt the prescription. It might be otherwise if there had been no judge in the lower court to grant an appeal.
Ibid.

A party cannot be called into court and then have his capacity to stand in judgment questioned.
Baker v. *Michinard*, 251.

A judge cannot exercise his discretion relative to the time of the trial of cases. The legislature has established the terms of the courts. Neither can he refuse a judgment by default at the proper time ; or grant a continuance, without the forms of law being strictly complied with. The judiciary is not invested by the constitution with legislative powers, and cannot deprive the citizen, by its rules, of his legal rights.
State ex relatione of Tooreau v. *Hon. R. T. Posey*, 252.

A defendant must be sued at the place of his domicil, *in personam*, unless he voluntarily submits to the jurisdiction of the court where suit is brought against him.
Dejona, f. w. c. v. *Steamboat Osceola et als.* 277.

The capacity of the plaintiff to stand in judgment must be pleaded in *limine litis*.
Ibid.

PRACTICE, *(Continued.)*

A writ of provisional seizure will lie against a boat running exclusively within the State, for services rendered on board.

Ibid.

The neglect or failure of one party to prove what is essential to his recovery, is not cured by the evidence of the other, leaving the fact doubtful.

Briggs v. *Simonds*, 294.

When the creditors of a succession, or an insolvent estate, who have an important interest in maintaining a judgment, have not been cited, nor their citation asked for by appellant, the appeal will be dismissed.

Succession of Constance Perret, 302.

The writ of *quo warranto* is an order rendered in the name of the State, by a competent court, and directed to a person who claims or usurps an office in a *corporation*, inquiring by what authority he claims or holds such office. Art. 868, C. P. This mandate is only issued for the decision of disputes between parties, in relation to the offices in *corporations*, as when a person usurps the character of *mayor of a city*, and such like.

Terry v. *Stauffer*, 306.

A *mandamus* is an order issued in the name of the State, by a tribunal of competent jurisdiction, and addressed to an individual, or corporation, or court of inferior jurisdiction, directing it to perform some certain act, belonging to the place, duty, or quality with which it is clothed.

Ibid.

An injunction is said to be a mandate obtained by plaintiff, prohibiting one from doing an act which, he contends, may be *injurious* to him, or *impair* a right which he claims. C. P. Art. 296. It is a conservatory act, an equitable remedy, which a party may obtain provisionally, on bringing his action. C. P. Art. 208. And, in order to obtain it, the party applying for the same must *state, under oath, the facts which*, according to his belief, *render an injunction necessary.*

Ibid.

By intervening and bonding property attached, the intervenor has relieved it from the lien of attachment, and removed it from the jurisdiction of the court, consequently he is bound as surety for whatever judgment may be rendered against *the defendant*, which is the tenor of his bond. He cannot, therefore, be heard to construe his obligation so as to defeat the law.

Ledda v. *Captain Maumus et als.* 314.

The statute of 20th March, 1839, amendatory of Art. 259 C. P., restricts the judgment to be obtained to the surety on the bond, and does not contemplate a proceeding, by that mode, against the principal.

Ibid.

PRACTICE, *(Continued.)*

The Supreme Court can only exercise its jurisdiction in so far as it shall have knowledge of the matters argued or contested below. C. P. Art. 895. If, therefore, the copy of the record brought up be not duly certified by the clerk of the lower court, *as containing all the testimony adduced*, the Supreme Court can only judge of such cause on a statement of facts prepared and signed in the manner directed in the second section of the sixth chapter of the preceding title, or on a written exception to the opinion of the judge, or on a special verdict; and, in the absence of all these, it shall reject the appeal, with costs; but this is to be understood with such modifications as are contained in the following Articles. (896–7.)
Kearny v. *Nixon et als.* 318.

One, whether a party or stranger to the cause, may appeal from a final judgment, if he alleges that he is aggrieved thereby; and, from an interlocutory judgment, when such judgment may cause him an irreparable injury; provided the amount or value in dispute is sufficient, and the party is not debarred by his own act from taking an appeal.
State ex relatione Mead v. *Judge of the Third Judicial District*, 320.

PRESCRIPTION.

A silence of five years in the settlement of partnership accounts will bar any claim for balances.
Succession of Edward Parker, 28.

Presciption does not begin to run until from the time of eviction.
Friedlander v. *Bell*, 42.

In general, all personal actions, except those expressly enumerated, are prescribed by ten years, if the creditor be present, and twenty years, if he be absent.
Millaudon v. *Lesseps*, 246.

The claim of an agent against his principal for services is not embraced in the words "open accounts," which, by the statute of 1852, are prescribed against in three years. Ten years is the only prescription against such a demand.
Ibid.

The plea in compensation has a retroactive effect from the time when the plaintiff and defendant became indebted to each other. Hence, the plea of prescription must be overruled where the debts existed simultaneously.
Ibid.

Where, after five years had elapsed from the maturity of notes, a party makes provision for their payment in an act of sale, it is a tacit renunciation of prescription. He acknowledges their binding effect on providing for their payment.
Succession of Ferguson, 255.

PRESCRIPTION, *(Continued.)*

In a redhibitory action the prescription of one year does not apply, except from the date of the discovery of the vice; and then not in the case of an absentee against whom no process could issue within that period. *Contra non valentem agere non currit prescriptis.*
Murphy v. *Guiterez*, 271.

The acknowledgment of a debt by the wife, without his express authority, will not bind the husband, unless she herself is a public merchant; nor can she bind herself for his debt by such an acknowledgment.
Bower & Garner v. *Frindell and Wife*, 299.

PRINCIPAL AND AGENT.

A mandate must be express to sue out a writ of sequestration.
Lithgon & Co. v. *Byrne*, 8.

Fiduciary agents cannot transfer negotiable assets without an order of court.
Burbank, Curator, v. *Payne & Harrison*, 15.

The acquiescence of the principal in the conduct of the agent, is a clear ratification of his action.
Featherston v. *Graham & Buckingham*, 42.

The law requires the same amount of evidence to prove a verbal power of attorney as it does to prove a verbal contract for money or personal property; and that, when a party attempts to enforce a contract for the payment of money, above $500, made by agent, he should prove, by at least one credible witness and other corroborating circumstances, the verbal agency.
Gardes et als. v. *Schroeder & Schreiber*, 142.

No man ought to be held responsible for the acts of another done to his prejudice and against his will. Thus it is held in regard to the *negotiorum gestor*, that the latter must have intended to act in the interest of, and to manage the affairs of another, and not his own; and the management must have been useful at the time.
Woodlief & Legendre v. *Moncure*, 241.

The claim of an agent against his principal for services is not embraced in the words "open accounts," which, by the statute of 1852, are prescribed against in three years. Ten years is the only prescription against such a demand.
Millaudon v. *Lesseps*, 246.

The mandatory, or attorney, is answerable for the interest of any sum of money he has employed to his own use, for the time he has so employed it; and for that of any sum remaining in his hands, from the day he become a defaulter by delaying to pay it over.
Ibid.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGE.

Where a firm makes advances on consignments they cannot be required to forward them to third persons subsequently, and thus be deprived of their privilege.

Bowker & Edmonds v. *Connolly & Co.* 12.

See Practice.

PUBLIC OFFICERS.

The Secretary of State cannot go behind commissions officially presented to him for authentication. Neither will this court go behind a commission to inquire into the evidence on which it was issued.

Terry v. *Stauffer*, 306.

It is the duty of the Govornor to fill vacancies. In elective offices he cannot remove an incumbent; but the appointment to fill a vacancy does not operate a removal of the previous incumbent, because no removal can so be made; the office is vacant, or it is not vacant; if it is vacant, it is properly filled by the last appointment; if it is not vacant, the first incumbent cannot be disturbed.

Ibid.

With regard to offices of a public nature, that is, which are conferred in the name of the State, by the Governor, with or without the consent of the Senate, the usurpations of them are prevented and punished in the manner directed by the penal code.

Ibid.

PUBLIC USE.

Where a road, once dedicated to public use, has since ceased to be used for public purposes, and is not required by front proprietors thereon, its soil reverts to the owners.

Mendez et al. v. *Dugart*, 171.

A charter granted in consideration of water supplied for *public* purposes will not be construed so as to apply to quasi-public purposes, such as for the city hall, etc. A "public" purpose is for the universal public, and not a portion of it.

Commercial Water Works v. *City of N. O.* 190.

QUO WARRANTO.

The writ of *quo warranto* is an order rendered in the name of the State, by a competent court, and directed to a person who claims or usurps an office in a *corporation*, inquiring by what authority he claims or holds such office. Art. 868, C. P. This mandate is only issued for the decisions of disputes between parties, in relation to the offices in *corporations*, as when a person usurps the character of *mayor of a city*, and such like.

Terry v. *Stauffer*, 306.

RATIFICATION.

See Principal and Agent.

RECONVENTION.

Where evidence was received without objection, by way of reconvention, it will be sustained as if a formal plea to that effect had been filed.

Kean v. *Wm. L. Brandon et al.* 37.

Where the judge of the court below gives judgment for the plaintiff, but makes no allusion to the plea in reconvention, set up by the defendant, it is an irregularity, and the case will be remanded.

Sientes v. *Odier & Co.* 153.

See Damages.

REDHIBITION.

The exclusion of warranty in a sale cannot avail the vendor, when it is fraudulently made, as he is bound to disclose redhibitory vices and defects, not apparent in the things sold, when he knows of their existence; and the vendee is not precluded, by such exclusion, from showing that at, and previous to the time and date, the vendor was aware of the existence of redhibitory defects, and fraudulently concealed them.

Huntington v. *Brown*, 48.

Although it be agreed that the seller is not subject to any warranty, he is, however, accountable for whatever results from his personal acts, and any contrary stipulation is void. His silence will not avail him, when he does not disclose infirmities.

Ibid.

Redhibition is called the avoidance of a sale on account of some vice or defect in the thing sold, which renders it absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice.

Coulon v. *Semmes et al.* 119.

RES JUDICATA.

The reasoning and the opinion of a court upon a subject, on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject matter be definitely disposed of by *the decree* of the court.

Davis v. *Millaudon, Agent*, 97.

ROADS AND LEVEES.

See Public Use.

SALE.

The law requires the proof of sale of immovable property to be in writing; but when actual delivery has been made, a verbal sale or other disposition of such property may be proved by interrogatories propounded to either vendor or vendee, the reply to which would be a confession of title. No other kind of questions are permitted.

Haughery v. *Lee*, 1.

SALE, *(Continued.)*

Answers to interrogatories are not required to be made in any peculiar set phrases, so that they are responsive.

Ibid.

The exclusion of warranty in a sale cannot avail the vendor, when it is fraudulently made, as he is bound to disclose redhibitory vices and defects, not apparent in the things sold, when he knows of their existence; and the vendee is not precluded, by such exclusion, from showing that at, and previous to the time and date, the vendor was aware of the existence of redhibitory defects, and fraudulently concealed them.

Huntington v. *Brown,* 48.

Although it be agreed that the seller is not subject to any warranty, he is, however, accountable for whatever results from his personal acts, and any contrary stipulation is void. His silence will not avail him, when he does not disclose infirmities.

Ibid.

At a sale *à la folle enchère* when the thing is adjuged for a smaller price than that which had been offered by the person to whom the first adjudication was made the latter remains a debtor to his vendor for the deficiency, and for expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudicated, the first purchaser has no claim for the excess. The vendor can prosecute the vendee for a specific compliance with the terms of the sale, as for damages, by an ordinary action, or proceed to a resale at the risk of the vendee. This last remedy is a severe one, and must come clearly within the provisions of the law.

Miltenberger v. *Hill et als.* 52.

If one sells or alienates a piece of land, from one fixed boundary to another, the purchaser takes all the land between such bounds, although it gives him a greater quantity than his title calls for, and the surplus exceeds the twentieth part mentioned therein. Neither can there be increase or diminution on account of disagreement in measure.

Davis v. *Millaudon,* 97.

Redhibition is called the avoidance of a sale on account of some vice or defect in the thing sold, which renders it absolutely useless, or its use so inconvenient and imperfect, that it must be supposed that the buyer would not have purchased it had he known of the vice.

Coulon v. *Semmes et al.* 119.

Parol testimony cannot be received to establish a contract of sale of immovables, or show damages resulting from the non-compliance of the vendor in refusing to pass the act of sale. Even a promise to sell must be proved in writing.

Halsmith v. *Castay,* 140.

SALE, *(Continued.)*

When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed, counted or measured; but the buyer may require either the delivery, or damages, in case of the non-execution of the contract.
Seris v. *Bellocq, Noblom & Co.* 146.

If the object to be given is uncertain, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered.
Ibid.

Damages are properly assessed by the judge *a quo* at the time the defendants were put in default.
Ibid.

A sale which is valid by the laws of the country where it is made, is valid everywhere. The *lex loci contractus* must govern.
Fell v. *Darden & Co.* 236.

The rule of law is *caveat emptor;* and where a party purchases an article, on inspection, he cannot afterwards complain of the consequences of his own act.
Catharine McGuire. tutrix, v. *Kearny, Blois & Co.* 295.

SALE, JUDICIAL.

If a sheriff sell anything, without previously doing what the law requires from him, for the validity of the sale, and his vendee be obliged to abandon the thing bought, in consequence of his vendor's neglect, the latter must indemnify the former.
Friedlander v. *Bell et al.* 42.

At a sale *a la folle enchère*, when the thing is adjudged for a smaller price than that which had been offered by the person to whom the first adjudication was made, the latter remains a debtor to his vendor for the deficiency, and for expenses incurred subsequent to the first sale. But if a higher price is offered for the thing than that for which it was first adjudicated, the first purchaser has no claim for the excess. The vendor can prosecute the vendee for a specific compliance with the terms of the sale, as for damages, by an ordinary action, or proceed to a re-salé at the risk of the vendee. This last remedy is a severe one, and must come clearly within the provisions of the law.
Miltenberger v. *Hill et als.* 52.

Where a debtor waives an appraisement, when called upon by the sheriff, of a sale of his property on *fi. fa.*, and purchases part of the property himself, he cannot complain of the irregularity of the proceedings.
Desplate v. *St. Martin et als.* 91.

SALE, JUDICIAL, *(Continued.)*

A judicial sale of a lease imposes upon the purchaser the obligation of paying the price to the vendor, and that of paying the rent, accruing after the sale, to the lessor, according to the terms of the lease; and this whether it is so announced in the advertisement or not.
Brinton, syndic, v. *Madame Datas,* 174.

SEIZURE AND SALE.

In actions of revendication of real property, or when proceedings are instituted in order to obtain the seizure and sale of real property, the defendant may be cited either at the place where the property is situated, or where he has his domicil, at the option of the plaintiff.
Roman et als. v. *Denney et als.* 126.

There is no necessity for alleging or proving demand or protest of mortgage notes.
Ibid.

An appeal will lie from a judgment on a rule in the court below dismissing an opposition to an order of seizure and sale.
Heft v. *Kelty,* 143.

SEQUESTRATION.

Where a suit is commenced by a writ of sequestration, the judgment of the court below should have been *in rem* alone, reserving to the plaintiffs their right to an action *in personam.*
Peterson v. *Williard,* 93.

See Practice.

SERVITUDE.

Where a road, once dedicated to public use, has since ceased to be used for public purposes, and is not required by front proprietors, thereon, its soil reverts to the owners.
Mendez et al. v. *Dugart,* 171.

SHERIFF.

If a sheriff sell anything, without previously doing what the law requires from him, for the validity of the sale, and his vendee be obliged to abandon the thing bought, in consequence of his vendor's neglect, the latter must idemnify the former.
Friedlander v. *Bell et al.* 42.

Where a debter waives an appraisement, when called upon by the sheriff, of a sale of his property on *fi. fa.*, and purchases part of the property himself, he cannot complain of the irregularity of the proceedings.
Desplate v. *Martin et als.* 91.

SHIPPING.

Any accident, except such as impossible to be foreseen or avoided, that may happen to any steamboat from running in or afoul of another boat; or, whenever an accident happens from the boat being over-

SHIPPING, *(Continued.)*

loaded, the owner of the boat causing such accident shall be responsible for all loss and damage as a common carrier and also subject to fine and imprisonment.
Creen et al v. *Croce et al.* 3.

In a contract of affreightment, where the defendants expressly allege and clearly prove that the damage to goods was caused by stress of weather and dangers of the sea, beyond their control, they will not be held liable.
Letchford et al. v. *Ship Golden Eagle et als.* 9.

Where articles of greater value are packed in the same box with ordinary freight, it does not change their character, and will not relieve the common carrier from liability for their loss, if those more valuable goods are not lost.
Hyde & Goodrich v. *N. Y. & N. O. Steamship Co.* 29.

Where freight is received without objection or protest, on the part of defendant, it is too late to dispute the legality of plaintiff's claim.
Marcy et al. v. *Warner & Co.* 34.

Where an abandonment for a total loss is notified, by the master, to the underwriters, and accepted by their agent, it is binding, and passes the property to the insurers, if otherwise valid.
Graham & Boyle v. *Ledda,* 45.

The necessity for a sale of a vessel cannot be denied, when the peril, in the opinion of those capable of forming a judgment, make a loss probable, though the vessel may, a short time afterwards, get afloat.
Ibid.

A bill of lading can have no effect until its delivery to the consignee.
Ibid.

The ratification of an abandonment to the agent of the underwriters dates back to the time of the act or contract ratified.
Ibid.

The shipper is not bound to disclose the value of the goods, unless asked; but the carrier has the right to inquire, and to have a true answer; and, if deceived, he will not be responsible. If he make no inquiry and no artifice mislead him, he will be responsible for any loss, however great the value of the articles.
Levois v. *Gale, Captain, and owners of ship R. D. Shepherd,*, 302.

See Common Carriers.

SIMULATION.

See Sale.

SLAVES AND STATU LIBERI.

Persons holding a slave under a precarious title in Alabama can not obtain a remedy in our courts.
Hall v. *McLauren,* 35.

SLAVES AND STATU LIBERI, *(Continued.)*

The slave who has acquired the right of being free at a future time, is, from that time, capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the meantime it must be administered by a curator.
Succession of Chappel, 174.

SOLIDARITY.

See CONTRACTS.

STATUTES.

Where a statute has been repealed since the rendition of a judgment, inflicting a penalty, in the court *a quo*, this court cannot affirm it.
Mouras v. *Schooner Brewer, Captain et als.* 82.

Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning; and this rule is no less applicable to contracts than to laws. See Art. 1943 C. C.
The Commercial Bank of N. O. v. *The City of N. O.* 190.

The usage under a statute is its best interpreter.
Ibid.

SUBROGATION.

See SURETY.

SUCCESSIONS.

When a person dies, leaving property in two or more States or countries, his property in each State is considered as a separate succession, for the purposes of administration, the payment of debts and the decision of the claims of parties asserting title thereto.
Burbank, curator, v. *Payne & Harrison*, 15.

The laws establishing *the order* of successions, and those which treat of *their administration*, are essentially different.
Succession of Lumsden, 38.

An inheritance remains without an heir and in abeyance until the rightful heir accepts or rejects it, according to the Article 1026, C. C., giving him time for deliberation. Such an heir has but a residuary interest. C. C. 1066.
Ibid.

Heirs, while they are not concluded by a tableau of distribution, have yet the right to appear and oppose it.
Succession of Barbour, 133.

A rule is not the proper mode to dispose of an opposition, when excepted to.
Ibid.

SUCCESSIONS, *(Continued.)*

The slave who has acquired the right of being free at a future time, is, from that time, capable of receiving by testament or donation. Property given or devised to him must be preserved for him, in order to be delivered to him in kind, when his emancipation shall take place. In the meantime it must be administered by a curator.
Succession of Chappel, 174.

SURETY.

Suretyship is restrained within the limits expressed and intended by the contract.
Grieff & Co. v. *Kirk et als.* 25.

Suretyship is an accessary promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not.
Pecquet v. *Pecquet's Executor et al.* 204.

Under the provisions of our law the contract of suretyship is of a mixed character.
Ibid.

The obligation of the surety is to pay the whole debt; but this solidarity is tempered by the right of division. The right, however, vests in *facultate.*
Ibid.

The surety has the right to demand the division: but until the right is exercised the obligation is solidary.
Ibid.

The suretyship cannot exceed what may be due by the debtor, nor be contracted under more onerous conditions.
Ibid.

It may be contracted for a part of the debt only, or under more favorable conditions.
Ibid.

The suretyship which exceeds the debt, or which is contracted under more onerous conditions, shall not be void, but shall be reduced to the conditions of the principal obligation.
Ibid.

A man may be surety without the order or even the knowledge of the person for whom he becomes surety.
Ibid.

Subrogation takes place of right for the benefit of him who, being bound with others, or for others, for the payment of the debt, had an interest in discharging it.
Ibid.

By intervening and bonding property attached, the intervenor has relieved it from the lien of attachment, and removed it from the jurisdiction of the court; consequently, he is bound as surety for

SURETY, *(Continued.)*

whatever judgment may be rendered against *the defendant*, which is the tenor of his bond. He cannot, therefore, be heard to construe his obligation so as to defeat the law.
Ledda v. *Captain Maumus et als.* 314.

The statute of 20th March, 1839, amendatory of Art. 259 C. P. restricts the judgment to be obtained to the surety on the bond, and does not contemplate a proceeding, by that mode, against the principal.
Ibid.

TAXES, TAX SALES AND TAX COLLECTORS.

The usufructuary is liable, during his enjoyment, to all the annual charges, to which the things subject to the usufruct may be liable.
Coleman v. *Poydras Asylum,* 325.

He is obliged to pay all taxes and contributions imposed on the property subject to the usufruct, as well as all ground rents which may have been charged upon the property, previous to the commencement of the usufruct.
Ibid.

TENDER.

A tender, in open court, of the thing demanded, is an admission that the thing itself is due, and is, therefore, inconsistent with the averment that the thing is not due; neither can defendant withdraw his tender subsequently, so as to affect any rights the plaintiff may have acquired under it.
Davis v. *Millaudon,* 97.

The plea of payment is inconsistent with a general denial, consequently a plea of tender.
Ibid.

The tender of a thing claimed in a suit, when made in the course of judicial proceedings, and in an unqualified and unrestricted manner, carries always with it the presumption which the law attaches to a judicial confession; but, where such tender is made, *not of the thing claimed, but of something else,* with a special reservation (if not accepted) of all legal rights, and with the special defence that the thing claimed is not actually due, it has not that conclusive effect.
Ibid.

TRUST AND TRUSTEES.

The statutes and regulations which corporations enact for their police and discipline, are obligatory upon all their respective members, who are bound to obey them, provided such statutes contain nothing contrary to the laws of public liberty, or to the interest of others.
German Evangelical Congregation of Lafayette v. *Pressler,* 127.

There is one principle common to the trustees of all incorporated churches. They have the possession and the custody of the tem-

TRUST AND TRUSTEES, *(Continued.)*

poralities of the church. They are considered *virtute officii* entitled to the possession, and are lawfully seized of the grounds, buildings, and other property belonging to the church. Though they hold the church property in trust for the congregation, still, it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion, made against their will, whether by the pastor, members of the congregation, or by strangers.
Ibid.

USAGE.

See Common Carriers.
See Shipping.

USUFRUCT.

The usufructuary is liable, during his enjoyment, to all the annual charges, to which the things subject to the usufruct may be liable.
Coleman v. *Poydras Asylum*, 325.

He is obliged to pay all taxes and contributions imposed on the property subject to the usufruct, as well as all ground rents which may have been charged upon the property, previous to the commencement of the usufruct.
Ibid.

The usufructuary is also bound, during his enjoyment, to cause to be made and repaired the roads, bridges, ditches, levees and the like, for which the estate of which he has the usufruct, may be liable.
Ibid.

With respect to extraordinary or temporary charges, which may be imposed on things subject to the usufruct during its pendency, the usufructuary is bound to support them, unless they are of a nature to augment the value of the property subject to the usufruct.
Ibid.

In this last case the usufructuary is bound to pay them, and shall be reimbursed by the owner at the termination of the usufruct, for the capital expended only.
Ibid.

USURY.

See Interest.

WARRANTY.

Execution of a judgment against a warrantor will be suspended until the warrantee shall have paid the amount thereof to the plaintiff.
City of New Orleans v. *Ferriere et als.* 188.

WILLS.

No testament can have effect unless it has been presented to the judge of the parish in which he died, if he died within the State; therefore, an executor in possession of a will has the right to have a nuncupative will registered and executed, although the estate had been fully administered and the property delivered into the possession of the legal heir. It is not necessary that he should, nor can he, resort to a direct action of nullity, until the testament is ordered to be executed.
The State v. *The Judge of the Second District Court of N. O.* 189.

If a donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects to be given, the donation, though not accepted in express terms, has full effect.
Pecquet v. *Pecquet's Executors et als.* 204.

WITNESS.

Where a witness is merely a nominal party to the suit, and disclaims any personal interest therein, he is competent.
Creen et al. v. *Crose et al.* 3.

A towboat's private book of rules and regulations cannot be received in evidence even when accompanied by oral testimony.
Ibid.

Commercial partners are bound *in solido*, and where such a partnership existed, oral testimony will be received to establish it.
Villa v. *Jonté et al.* 9.

A co-defendant cannot be made a witness against the plaintiff.
Bell v. *Black et al.* 11.

Parol testimony cannot be received to establish a contract of sale of immovables, or show damages resulting from the non-compliance of the vendor in refusing to pass the act of sale. Even a promise to sell must be proved in writing.
Halsmith v. *Castay.* 140.